No. 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH AND HOSPITALS CORP.,

Petitioners,

vs.

DR. LOUIS SULLIVAN, or his successor, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Do new regulations promulgated by DHHS under Title X of the Public Health Service Act which prohibit abortion counseling, referral and advocacy in programs funded under the Act and require physical separation of Title X-funded facilities from facilities engaging in abortion-related services, violate the First Amendment?

2. Does the regulations' prohibition of abortion counseling and referral in a Title X-funded program violate the woman's constitutionally protected privacy right to make a fully informed decision on whether or not to continue her pregnancy?

3. Do the regulations' ban on abortion counseling and referral in Title X-funded programs and the requirement of physical separation violate congressional intent underlying Title X?

4. Are the new regulations arbitrary and capricious because they reverse longstanding agency policy in the absence of any intervening change in circumstances and because the change in policy was unquestionably politically motivated?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit are:

1. The State of New York, the City of New York and the New York City Health and Hospitals Corporation, plaintiffs-appellants in the court below.

2. Dr. Louis Sullivan, as Secretary of the United States Department of Health and Human Services, defendant-appellee in the court below.[1]

[1] Pursuant to Fed. R. App. P. Rule 43(c), Dr. Sullivan was substituted for Otis R. Bowen, who was Secretary of Health and Human Services at the time this action was filed.

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OPINIONS BELOW

The decision of the district court is reported as *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), and is reproduced in the appendix to the petitions for certiorari at 9-32a. The opinion of the United States Court of Appeals for the Second Circuit is reported as *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), and is reproduced in the appendix to the petitions for certiorari at 35-67a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1989, and the petition for certiorari was filed pursuant to 28 U.S.C. § 1254(1) on March 1, 1990. The petition was granted on May 29, 1990. 110 S. Ct. 2559.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law. . . abridging the freedom of speech. . . .

United States Constitution, Amendment V:

> No person shall. . . be deprived of life, liberty, or property, without due process of law. . . .

Title X of the Public Health Service Act, 42 U.S.C. § 300(a):

> The Secretary is authorized to make grants to and enter into contracts. . . to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services. . . .

Title X of the Public Health Service Act, 42 U.S.C. § 300a-6:

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

Title X of the Public Health Service Act, 42 U.S.C. § 300a(a):

> The Secretary is authorized to make grants, from allotments made under subsection (b) of this section, to State health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services. No grant may be made to a State health authority under this section unless such authority has submitted, and had approved by the Secretary, a State plan for a coordinated and comprehensive program of family planning services.

Title X of the Public Health Service Act, 42 U.S.C. § 300a-3(a):

> The Secretary is authorized to make grants to public or nonprofit private entities and to enter into contracts with public or private entities and individuals to assist in developing and making available family planning and population growth information (including educational materials) to all persons desiring such information (or materials).

Title X of the Public Health Service Act, 42 U.S.C. § 300a-4:

> A grant may be made or contract entered into under section 300 or 300a of this title for a family planning service project or program only upon assurances satisfactory to the Secretary that —
>
> > (1) priority will be given in such project or program to the furnishing of such services to persons from low-income families; . . .

Grants for Family Planning Services, 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10.

STATEMENT OF THE CASE

The Title X Program and the Challenged Regulations

In 1970 Congress enacted Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-41 (1982), to provide low-income women with access to family planning services. Title X is the largest source of federal support for family planning and reproductive health care, funding over 3900 clinics nationwide and serving nearly 4.5 million low-income women per year. *See* Morley ¶ 6 (224-25JA).[2] In addition to providing information and education on "a broad range of acceptable and effective . . . methods" of spacing children, 42 U.S.C.A. § 300(a) (West 1982),

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[2] Materials appearing in the Joint Appendix to this brief will be referred to as ("____JA"). The Appendix is jointly filed by petitioners the State of New York *et al.* and by petitioners Rust *et al.* Materials appearing in the appendix to the petition for certiorari will be referred to as ("____a"). Materials appearing in the appendix to the Second Circuit Court of Appeals will be referred to as ("____A").

Title X clinics dispense some general medical care and refer patients for all services not provided by the clinics.[3]

The program was created in "recogni[tion] of a basic human right, the right to freely determine the size of one's family, the timing of one's children." 116 Cong. Rec. 37381 (1970). Through Title X Congress intended to provide access to family planning services for low-income women so that they could have the same range of reproductive choice as women of greater means. 42 U.S.C. § 300a-4(c)(1).

Title X has operated successfully for two decades, and is particularly important to the delivery of health care in New York State,[4] serving precisely those women Congress intended to reach. The overwhelming majority of patients are poor women, most of whom have incomes below 150% of the poverty line, Gesche ¶ 6 (171JA); Henshaw ¶ 18 (194JA); Fink ¶ 3 (160JA), and a substantial portion are adolescents, Gesche ¶ 7 (171JA). It is a population in acute need of medical information and services, suffering from disproportionately high rates of teenage pregnancy, infant mortality and sexually transmitted diseases. *See, e.g.*, Joseph ¶¶ 7, 8 (199JA); Bennett ¶ 7 (496A); Coombs ¶ 10 (142-44JA); Morgan ¶ 4 (218JA).[5] But in February 1988, for

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[3] *See* HEW, *Program Guidelines for Project Grants for Family Planning Services* (1981) §§ 8.3, 9.1-3, 9.4 (35-36A,39A). *See* 42 C.F.R. § 59.5(b)(1) (1988). Congress in fact envisioned the Title X clinics as providing an entry point into the general health care system, by identifying undiscovered health problems and by offering referrals for all treatment needs. *See* 116 Cong. Rec. 37370 (1970) (Statement of Rep. Bush) (222A).

[4] There are two direct Title X grantees in New York State: the New York State Department of Health (NYSDOH) and the Medical and Health Research Association of New York City (MHRA), petitioner in the companion case to this one. Gesche ¶ 4(170JA); Fink ¶ 3(160JA). Together the NYSDOH and MHRA subgrant Title X funds in excess of $8 million to 40 delegate agencies, Gesche ¶¶ 4-5(170-171JA); Fink ¶ 4(160JA), which serve approximately 200,000 women throughout the state. Gesche ¶ 6(171JA).

[5] In New York's urban areas, the percentage of women infected with AIDS is among the highest in the nation. *See* Joseph ¶¶ 7-8 (199JA); Minkoff ¶¶ 5-6 (647A). One of every 60 women giving birth in New York City is HIV positive, with the rate rising to one in 50 in Manhattan and the Bronx. (Gesche Exh. F) (NYSDOH, *Newborn Seroprevalence Study* (1988)) (563A). In New York State, in 1988 alone, 2300 HIV-positive women were expected to give birth, with approximately 1000 of these infants being infected by the virus. Gesche ¶ 17 (175JA).

blatantly political reasons, the Secretary of HHS promulgated new regulations that are entirely at odds with the First Amendment, constitutional privacy guarantees, and the letter and spirit of Title X.

Section 1008 of Title X provides: "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. For 17 years, HHS had consistently interpreted this to mean that Title X providers may not perform abortions, but may, and indeed must, provide nondirective counseling to pregnant patients. *See, e.g.*, 1981 *Guidelines* § 8.6 (71a). In an abrupt about-face, the Secretary has reread this section to mean that family planning programs may no longer whisper the word "abortion" to their patients. Abortion — a legal alternative to an unwanted pregnancy — may not be mentioned, even in response to a direct inquiry, in the context of an intimate conference between physician and patient, and even if medically indicated for the individual involved.

In enacting the new regulations, HHS has chosen to stifle the speech of private health care professionals and the rights of their patients to receive unbiased medical information. The new regulations interfere with and damage the doctor-patient relationship on its most basic level, and, in effect, perpetrate a hoax on a young and vulnerable population.

The Regulations

Section 59.8(a)(1) prohibits all counseling about and referral for abortion, regardless of the woman's medical circumstances. Sections 59.8(a)(2) and (b)(4) require that every pregnant woman, even the woman who has decided not to continue her pregnancy, be provided with a "list of available providers that promote the welfare of the mother and unborn child." This referral list must include providers who do not perform abortions — regardless of their medical qualifications — but may not include providers whose "principal business is the provision of abortions," § 59.8(a)(3), (b)(3) and (4). The sole exception to this mandatory referral for prenatal care is when "emergency care is required." § 59.8(a)(2). Finally, if a woman asks about abortion, the regulations tell the provider to advise her that "the project does not consider abortion an appropriate method of

family planning and therefore does not counsel or refer for abortion." §59.8(b)(5).

Section 59.10 further prohibits activities that HHS deems to "encourage, promote or advocate abortion", including lobbying for legislation to increase the availability of abortion, paying dues to an organization that advocates abortion, or disseminating educational materials on abortion. Thus, clinics would be barred from making appointments for pregnant clients with abortion clinics, § 59.10(b)(2); offering clients a brochure advertising an abortion clinic, §59.10(b)(1); or discussing abortion in lectures or workshops on sex education, family planning or reproductive health. § 59.10(a)(2).

Section 59.9 requires that clinics attain complete physical and financial separation between approved Title X-funded and disapproved non-Title X-funded services. The Secretary had always previously held that § 1008 had no effect on activities funded by non-Title X sources. Thus, grantees were permitted to use private funds for other activities, including the provision of abortions, without the necessity of any physical separation. Under the new regulations, the Secretary is to look at various factors such as the existence of separate treatment, examination and waiting rooms and separate personnel, to determine on an ad hoc basis whether programs have achieved "program integrity".

For many low income women, Title X clinics are the sole source of reproductive care - and sometimes of any kind of health care, as Congress was aware and as HHS has acknowledged.[6] Thus, the net effect of the new regulations is censorship: an attempt by HHS to prevent poor women, with limited resources, from finding out about the existence and availability of a medically and legally acceptable option.

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[6] *See* 1981 *Guidelines* § 9.4. Title X clinics in New York as throughout the nation serve as one of the few sources of regular health care for poor women. *See* Randolph ¶ 10, 12 (244-45JA); Drisgula ¶ 18 (153JA); Potteiger ¶ 16 (91a); Tiezzi ¶ 8(a)(94a); Merrens ¶ 5 (284JA). A 1988 study by the Alan Guttmacher Institute found that Title X family planning services often constitute the only link to the general health care system for thousands of poor and teenage women. J.D. Forrest, "The Delivery of Family Planning Services in the United States", 20 *Family Planning Perspectives* 88 (1987).

History of the Litigation

In February 1988 the State and City of New York sued in the district court for the Southern District to enjoin the regulations, alleging that they were contrary to congressional intent underlying Title X, that they were arbitrary and capricious, and that they violated the constitutional privacy rights of women and the First Amendment rights of women and their health care providers. Subsequently, it was consolidated with another action simultaneously brought by various private health care providers and patients, *see Rust v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988).[7] On June 30, 1988 the district court granted summary judgment in favor of HHS and dismissed plaintiffs' consolidated complaints.

On November 1, 1989 a divided panel of the court of appeals affirmed. *New York v. Sullivan*, 889 F. 2d 401 (2d Cir. 1989). While recognizing that the regulations were a departure from longstanding agency policy, the majority found that they were consistent with the statutory language and legislative intent. *Id.* at 407-10. It did not engage in an analysis of whether the regulations were arbitrary and capricious. *Id.* at 410. It also concluded that the regulations did not impermissibly burden women's privacy rights. *Id.* at 410-12. It conceded that the regulations "may hamper or impede women in exercising their right of privacy in seeking abortions", but determined that "the practical effect of such a denial on the availability of such services is constitutionally irrelevant". *Id.* at 411. Similarly, it held that the ban on abortion counseling, referral and advocacy did not violate the First Amendment, as the government may refuse to subsidize the exercise of fundamental rights, including speech, and it was not viewpoint discriminatory. *Id.* at 412-14.

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[7] Two other actions challenging the regulations were filed at about the same time as the instant one. *See Planned Parenthood Fed'n of Am. v. Bowen*, 680 F.Supp. 1465 (D. Colo. 1988) (preliminary injunction), 687 F. Supp. 540 (D. Colo. 1988) (permanent injunction), *appeal pending*, No. 88-2251 (10th Cir.); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *aff'd*, *Massachusetts v. Sec'y of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*). Both actions resulted in the regulations being stricken on constitutional and statutory grounds. The decision of the First Circuit, therefore, directly conflicts with the decision of the Second Circuit.

The concurring judge, while finding the regulations to be permissible under the statute, expressed two concerns: first, that the separation requirement of § 59.9 authorizes the Secretary to deny funding based on the non-Title X activities of Title X-funded personnel and, second, that the compelled concealing of information about abortions and inadequate referrals would harm vulnerable patients. *Id.* at 414-15.

The dissenting judge found that the counseling and referral ban was viewpoint discriminatory in that it "require[d] the grantee to emphasize prenatal care and prohibit[ed] it from identifying any entity as a provider of abortions". *Id.* at 416. Moreover, she found that the content restriction was "all the more pernicious" in that it deprived women of their right to choose whether or not to have an abortion. *Id.* Finally, she concluded that the regulations were arbitrary and capricious because the turnaround in policy was not justified by any facts in the record before the agency, and because it was blatantly political. *Id.* at 417-18.

On November 21, 1989, the Second Circuit unanimously enjoined enforcement of the regulations and stayed its mandate pending disposition of the case by this Court (68-69a). Thus, petitioners continue to receive grant funds under the terms of the preexisting regulations.

SUMMARY OF ARGUMENT

The Secretary of HHS, in a dramatic reversal of agency policy, promulgated new regulations under Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-41, purporting to reinterpret the statute's prohibition against funding "programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (§ 1008 of the Act). Where former agency policy allowed, and in fact required, Title X health professionals to counsel pregnant women on all options including abortion, new § 59.8 forbids neutral speech about abortion and mandates speech promoting prenatal care in the counseling context, while new § 59.10 prohibits other activities by Title X recipients that are deemed to "encourage, promote or advocate abortion". Where former agency policy required only financial separation of Title X funded and independently funded abortion-related activities, new § 59.9 mandates that Title X programs be physically as well

as financially separate from facilities engaging in abortion-related activities. These regulations contravene congressional intent underlying Title X, are arbitrary and capricious, and violate free speech guarantees of the First Amendment and privacy guarantees of the due process clause of the Fifth Amendment.

First, the abortion counseling and referral ban goes far beyond § 1008, which only forbids funds for the provision of abortions. Section 1008, on its face and in the context of the statute as a whole, does not restrict the provision of neutral information about abortion, and in fact such a restriction would run counter to the aims of the program to provide high quality reproductive health care to low-income women. Contemporaneous and subsequent legislative history confirm that in enacting § 1008, Congress meant only to guard against abortion being used as a substitute for contraception, and that medically appropriate counseling and referral services were to be included as part of the "comprehensive family planning services" offered under Title X. The prior history of administrative enforcement demonstrates, too, that § 1008 was not intended to prevent the provision of truthful information about abortion.

The physical separation requirement similarly contravenes congressional intent. Congress repeatedly expressed its belief that Title X services were best offered in an integrated health setting, *i.e.*, coordinated with providers of other health care services. Physical separation undermines that intent by requiring costly duplication of resources, or even closings of facilities, thus reducing clinics' ability to serve their intended patients.

Second, the regulations are arbitrary and capricious because they are not the result of any intervening change in circumstances, are not rationally related to the evidence before the agency, and have been conceded by the Secretary to be politically motivated.

Third, the regulations are unconstitutional. By suppressing speech about abortion and mandating speech about prenatal care in the informed consent dialogue, the Secretary has impermissibly infringed upon the First Amendment rights of the physician and the patient. The counseling, referral and advocacy ban is unquestionably viewpoint-discriminatory, censoring any

speech about abortion which is neutral or nonpejorative and compelling pro-childbirth speech. Because the counseling and referral bans are "aimed at the suppression of dangerous ideas", they are not saved by the fact that they are in the guise of a government funding decision. The separation requirement likewise violates free speech guarantees by impermissibly burdening the independently-funded expressive activities of Title X grantees.

Lastly, the counseling and referral bans impermissibly interfere with the woman's privacy right to make a fully informed decision whether or not to terminate her pregnancy. Speech restrictions such as these do not merely leave the woman in the same position as if there were no funded family planning services, but affirmatively mislead her, and erect obstacles to the exercise of her constitutional rights.

ARGUMENT

I. THE REGULATIONS EXCEED HHS' STATUTORY AUTHORITY AND ARE ARBITRARY AND CAPRICIOUS

For 17 years following enactment, the Secretary has implemented Title X in full recognition of the fact that Congress, while not intending to fund abortions, expected that women using Title X funded facilities might receive counseling and referral for abortion, and that Title X funding for family planning services would be an integral part of programs by states, localities and private entities to provide such services. The Secretary also recognized that the limitation on Title X funding of abortion should in no way limit or interfere with the programs with which the Title X funded program was to be coordinated, even if the non-Title X funded programs provided for abortion. The Secretary has now abandoned these understandings of his responsibilities under Title X. In promulgating the new regulations, he has exceeded his authority and violated virtually every established principle of statutory construction.

A. The Regulations Prohibiting Abortion Counseling And Referral Are Contrary To The Intent Of Congress As Well As Arbitrary And Capricious

1. *The Regulations Are Contrary To The Plain Language of Section 1008 of Title X*

The starting point for interpreting a statute is its language. Because the Court assumes that the ordinary meaning of the words used expresses the legislative purpose, the language of the statute is conclusive unless there is clearly expressed legislative intent to the contrary. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). In discerning the plain meaning of the statute, the Court must look not only at "the particular statutory language at issue" but also at "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *see also Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 405-06 (1988); *Dole v. United Steelworkers of America*, 110 S.Ct. 929, 935 (1990).[8]

Considered on its own and in the context of Title X as a whole, the text of § 1008 provides a fully sufficient basis for deciding this case. Under Title X, the Secretary is empowered to make grants and enter into contracts "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning *methods and services*." 42 U.S.C. § 300(a). (emphasis added). With § 1008, Congress addressed the place of abortion within Title X

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[8] The court of appeals below failed to heed basic principles of statutory construction when it concluded that § 1008 "specifically excludes" counseling and referral for abortion from the scope of Title X. *New York v. Sullivan*, 889 F.2d at 408. Nowhere in § 1008, or in the statute as a whole, is abortion counseling and referral "specifically excluded". On the contrary, the only category specifically excluded by § 1008 is the "method" of "abortion" and not talk about abortion. Second, the Second Circuit failed to consider the "ordinary usage", *see Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring), of the terms "method of family planning" and "abortion." Third, the Second Circuit's overly broad reading of § 1008 contravenes the rule that additional statutory exceptions should not be implied where certain exceptions have been explicitly enumerated. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). Finally, the Second Circuit failed to construe § 1008 in conjunction with the statute as a whole, *see K Mart*, 108 S. Ct. at 1817, by not honoring the statutory distinction between "methods" and "services."

in clear, precise language. As an exception to "the broad range of acceptable and effective family planning methods and services" that Title X recipients were required to offer, § 1008 states: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a *method* of family planning." 42 U.S.C. § 300 a-6 (emphasis added).

Taken alone, the words of § 1008 denote only that Congress wanted to exclude the abortion procedure from the range of family planning methods funded under Title X. The word "abortion" commonly refers in both general and medical usage to the act or procedure of terminating a pregnancy.[9] *See Webster's Third New International Dictionary* 5 (1971); *Stedman's Medical Dictionary Fifth Unabridged Lawyer's Edition* 3-4 (1987). A "method" is "a procedure or process for attaining an object." *See Webster's* 1422-23. Likewise, in the medical community, the term "method" refers to a procedure or technique, and in particular to the procedure of an operation. *See The Sloane-Dorland Annotated Medical — Legal Dictionary* 448 (1987) ("method" defined as "the manner of performing any act or operation; a procedure or technique"); *see also Dorland's Illustrated Medical Dictionary* 808 (1981); *Stedman's* 867. Thus, in their ordinary context, the words of § 1008 spell out a restriction on the funding of a particular procedure, that is, abortion. It does not set forth an additional restriction on the mere provision of *information relating to* abortion.

Moreover, by requiring Title X programs to provide both family planning "methods" *and* "services," Congress treated the two as distinct concepts. Section 1008 excludes only a particular family planning *method* — abortion — from the Act's scope. Nothing in the statute authorizes a similar restriction on the range of comprehensive family planning "services" to be provided. When, as here, Congress explicitly enumerated certain exceptions, this Court has often refused to enlarge the list by implication. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). Had Congress wished to exclude abortion

[9] It is appropriate for the Court to consider dictionary definitions of the words Congress used. *See, e.g., Pittson Coal Group v. Sebben*, 109 S. Ct. 414, 420 (1988); *Lukhard v. Reed*, 481 U.S. 368, 374-75 (1987).

counseling and referral from its scope, it certainly could have made its intention known. *See, e.g.*, Adolescent Family Life Act, 42 U.S.C.A. § 300 z-10 (West 1982).

The rule of narrow construction of statutory exceptions is particularly apt in interpreting a remedial statute, *Piedmont & Northern Ry. Co. v. Commission*, 286 U.S. 299, 311-12 (1932), *see also* 3 *Sutherland Statutory Construction* § 64.08 at 217 (Sands 4th ed. 1986) (grant-in-aid statutes remedial in character), especially where it has been carefully crafted to effectuate a delicate compromise. Thus, while the statute expresses a preference for preventive family planning over abortion, it leaves Title X physicians free to provide a full range of acceptable and effective family planning services. A medically appropriate family planning program must offer counseling and referral services, including counseling and referral for abortion. *See Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* Op. 8.07 (1986). Sammons ¶ 3 (261JA).

The regulations conflict with the plain meaning of § 1008 in yet another way. They interpret "programs where abortion is a method of family planning" to embrace programs where any form of counseling or referral for abortion takes place. Yet it is clear that Congress was concerned with the specific possibility of funding abortions as a substitute for preventive family planning, not with the possibility of providing information about any and all uses of abortion.[10] In departing from the plain meaning of § 1008, the Secretary has fundamentally misconstrued congressional intent.[11]

[10] Congressional fears of abortion becoming a method of family planning were never borne out. There is no evidence that Title X providers have ever counseled pregnancy termination as a "family planning option" equivalent to diaphragms, intrauterine devices (IUD's), or oral contraceptives. Instead, Title X programs, like all high quality providers of reproductive health services, treat abortion as a backup to contraceptive or human failure and as an option when pregnancy termination is medically indicated. *See, e.g.*, Felton ¶ 13a (88a); *see also* Rust ¶ 17a (254-55JA); Tiezzi ¶ 8a (272-73JA).

[11] Until recently, HHS heeded the words of § 1008 when interpreting that provision. *See* National Center for Family Planning Services, Health Services and Mental Health Administration, Dep't of HEW, *A Five-Year Plan for the Delivery of Family Planning Services*, (Oct. 1971) ("Within the context of

(Footnote continued)

2. *The Legislative History of Section 1008 Is Consistent With Its Plain Meaning*

a. Contemporaneous History

Congress' intention that the services provided by Title X grantees be broad in scope permeates the legislative history. For example, a contemporaneous Senate Report states that the legislation's purpose is "to make comprehensive, voluntary family planning services" available to all persons who desire them. S. Rep. No. 1004, 91st Cong., 2d Sess. 3, *reprinted in* 116 Cong. Rec. 24094 (1970). This Report also emphasizes that "family planning [is not] merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices." *Id.* at 24095-96.

The legislative sources also reveal that Congress specifically intended the comprehensive services funded by Title X to include counseling and referral. Thus, the Senate Report declares that a "successful family planning program" must offer "[m]edical services" that include "*consultation*, examination, prescription, and continuing supervision, supplies, instruction, *and referral to other medical services as needed*." S. Rep. No. 1004, 91st Cong., 2d Sess. 10, *reprinted in* 116 Cong. Rec. 24094, 24096 (1970) (emphasis added). Similarly, the House Report accompanying the legislation, under the heading "Services," anticipates: "In all projects, *information* would be provided on the *full range of family planning methods*. . . ." H.R. Rep. No. 1472, 91st Cong., 2d Sess. 10, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068, 5074 (emphasis added).

The Conference Report, a legislative source entitled to great weight, *National Ass'n of Greeting Card Publishers v. United*

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family planning service programs, abortions are not viewed as a method of fertility control, but as a service that should be available in accordance with local laws only in the event of a human or contraceptive failure") (41-42JA); *see also* Memorandum from HEW (July 25, 1979) (Attachment A to *Amicus* Brief for HHS, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981) (No. 80-1471). ("Indeed, we think that where such a referral [for abortion] is necessary because of medical indications, abortion is not being considered as a method of family planning at all, but rather as a medical treatment possibly required by the patient's condition. . .") (73a).

States Postal Serv., 462 U.S. 810, 832 n.28 (1983), confirms that § 1008 is a narrow prohibition, not intended to interfere with Title X's expansive scope:

> It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, *and other related medical, informational, and educational activities*. The conferees have adopted the language contained in § 1008, which prohibits the use of such funds *for abortion*, in order to make clear this intent.

H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8-9, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5081-82 (emphasis added).

Moreover, the floor statement by Representative Dingell, author of § 1008, establishes that it was directed only at the abortion *procedure*. Rep. Dingell explains that he designed § 1008 to prevent Title X, through operation of the Supremacy Clause, from becoming the vehicle through which that procedure was legalized nationwide:

> The criminal codes of most States sanction abortion only in certain strict and clearly-circumscribed cases. Even the broadest interpretation of these laws would not lead one to the conclusion that they in any way allow for such a *procedure* as an accepted method of family planning. ***For the Congress of the United States to appropriate funds for a procedure which would violate the criminal law of a vast majority of American jurisdictions would be to raise constitutional questions of a most serious nature***. . . .

116 Cong. Rec. 37369 (1970); *See also id.* at 37367.[12]

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[12] Rep. Dingell's remarks also indicate that he did not offer § 1008 in order to curtail medically necessary abortions. 116 Cong. Rec. at 37379 n. 64. If Rep. Dingell viewed medically necessary *abortions* as outside § 1008's proscription, he surely could not have viewed *counseling and referral* for medically necessary abortions as forbidden by the Act.

The Secretary has cited an isolated statement made on the floor by Rep. Dingell in which he referred to the Committee's intent that "abortion is not to

(Footnote continued)

In addition, the Conference Report establishes that § 1008 was not intended to restrict the use by Title X projects of non-Title X funds. The Report is emphatic: "[Section 1008] does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8-9, *reported in* 1970 U.S. Code Cong. & Admin. News 5082. By defining § 1008 to apply to "all activities conducted by the federally funded project," Pr., 53 Fed. Reg. 2922 (317A), whether the activities are federally or non-federally funded, the regulation barring all abortion information contravenes this directive not to burden separately-funded activities.

b. Subsequent History

Postenactment legislative history, while not accorded the weight of contemporary legislative history, can provide evidence of legislative intent in some circumstances. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-35 (1982). One of these circumstances is congressional reenactment without change of a statute that has been the subject of an administrative interpretation. *NLRB v. Aerospace Co.*, 416 U.S. 267, 274-75 (1974). " 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change' ". *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985) (citations omitted). An agency is presumed to have correctly discerned legislative intent when Congress reenacts a statute after the agency's construction has been "fully brought to [its] attention," *North Haven*, 456 U.S. at 535; and an agency's interpretation is entitled to

be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37375 (1970), *cited in* Pr., 53 Fed. Reg. 2923 (318A). Nothing in Rep. Dingell's lengthy statement, however, suggests an intent to prohibit the provision of neutral, objective abortion information and referral services. Moreover, in comments on the new regulations, he abjured any intent to bar counseling and referral for abortion, and chastised the Secretary for "misus[ing] . . . my floor statement from the debate." Letter from John D. Dingell to Otis R. Bowen (Oct. 14, 1987) (137-39JA).

At any rate, even the contemporaneous remarks of a legislator who sponsors a bill are not controlling in analyzing legislative history. *Consumer Product*, 447 U.S. at 118; *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

substantial deference especially when it "involves issues of considerable public controversy." *United States v. Rutherford*, 442 U.S. 544, 554 (1979). Both enhancing factors are present in this case.

Few issues have been as closely followed and hotly debated, in and out of Congress, as abortion. In that sense, this case resembles *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983), in which this Court viewed Congress's failure to modify Internal Revenue Service rulings on racially discriminatory schools as ratification of the rulings. Consequently, Title X has been the subject of unusually close scrutiny by members of Congress. *See, e.g.*, 121 Cong. Rec. 9790 (1975) ("The Committee has also been watching the administration of these programs very closely.") (statement of Sen. Cranston). Congress also has repeatedly been made aware through annual agency reports[13] and General Accounting Office ("GAO") Audits that HHS interpreted Title X to allow grants to programs that counsel or refer for abortion.[14] In light of this history, it is sheer fancy to maintain that Congress was not aware of HHS' policies on abortion counseling and referral in Title X programs.

Congress reauthorized Title X six times without change,[15] and declined to use any of those opportunities to change agency

[13] Pursuant to the statute, Congress has received and reviewed reports from the agency throughout the life of the statute. 42 U.S.C.A. 300a-6a. Beginning in 1974, Congress required the agency to prepare and submit Five Year Plans to Congress for annual review. Congress has repeatedly reviewed and referred to these Five Year Plans and in fact has given the agency specific directions for their improvement. *See* H.R. Rep. No. 1161, 93d Cong., 2d Sess. 15 (1974) (261A); H.R. Conf. Rep. No. 1524, 93d Cong., 2d Sess. 59-60 (1974); S. Rep. No. 29, 94th Cong., 1st Sess, 60-62, *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 522-25; H.R. Rep. No. 159, 99th Cong., 1st Sess. 7-8 (1985) (279A); *see also* 121 Cong. Rec. 9789-90 (1975).

[14] A GAO report issued in 1982 expressly noted that the Department had long taken the position that a Title X grantee could provide information about abortion services; provide the name, address, and telephone number of abortion providers; inspect facilities to determine their suitability to provide abortion services; and pay dues to organizations that advocate the availability of abortion services. GAO, *Restrictions on Abortion and Lobbying Activities In Family Planning Programs Need Clarification* 12 (1982) (107JA).

[15] Title X was reauthorized in 1973. Pub. L. No. 93-45, 87 Stat. 91 (1973); again in 1975, Pub. L. No. 94-63, 89 Stat. 304, 306-07 (1975); again in 1977,

(Footnote continued)

policy.[16] In fact, the committee reports accompanying the reauthorizations demonstrate that Congress intended abortion counseling and referral to be among the services offered by Title X clinics. In 1974, the House Report accompanying the extension of Title X emphasized the importance of providing complete information about all the available services and of obtaining full and informed consent from the individuals served. H.R. Rep. No. 1161, 93d Cong., 2d Sess. 18-19 (1974). In 1975, the Senate Committee Report accompanying the reauthorization of Title X for the following year reiterated that any medical procedure or service funded by Title X required full explanation, disclosure of alternatives, and an offer to answer inquiries. S. Rep. No. 29, 94th Cong., 1st Sess. 62, *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 524-25.

In 1978, a Senate Report accompanying reauthorization *required* discussion of the option of abortion as part of the family planning services funded under Title X. The Senate Report emphasizes that informed consent to family planning must include discussion of "the risks of various alternatives, such as voluntary sterilization, abortion, and other options chosen voluntarily." S. Rep. No. 822, 95th Cong., 2d Sess. 39, *reprinted in* 124 Cong. Rec. 16454 (1978).

In 1985, Congress extended Title X's funding by continuing resolution. The House Report accompanying the resolution adopted HHS's 1981 *Program Guidelines* and interpreted § 1008 to permit, and Title X to require, nondirective counseling on the option of abortion. The House Report explicitly declared that

Pub. L. No. 95-83, 91 Stat. 383 (1977); in 1978, Pub. L. No. 95-613, 92 Stat. 3093 (1978); in 1981, Pub. L. No. 97-35, 95 Stat. 535 (1981); and in 1984, Pub. L. No. 98-512, 98 Stat. 2409 (1984). *See also* H.R. Rep. No. 159, 99th Cong., 1st Sess. 2 (1985) (summarizing history). Since 1985 the Title X program has been funded through a series of continuing resolutions.

[16] Contrary to the contention of the court below, 889 F.2d at 408, reauthorization without change of a federal grant statute, like any other reenactment, can imply ratification of an agency construction, and is strongly probative of legislative intent when Congress was aware of the agency interpretation. *See Grove City College v. Bell*, 465 U.S. 555, 568-69 n.19 (1984).

> [n]o agency shall be considered to be in violation of the language [of Title X] . . . if a pregnant woman is offered information and counseling regarding her pregnancy; those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative causes of action, and referral upon request: a. prenatal care and delivery; b. infant care, foster care or adoption; c. pregnancy termination.

H.R. No. 403, 99th Cong., 1st Sess. 6 (1985). It is clear from this and other committee reports that Congress specifically considered and approved the provision of abortion-related information services in clinics funded under Title X.

3. *The Regulations are Entitled to Little Deference*

Because the language, structure and history of the statute unequivocally express Congress' intention to permit abortion counseling and referral, this Court should not defer to HHS' newly hatched interpretation of the statute. *See Dole*, 110 S. Ct. at 934-38; *see also Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986) ("[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter").

Even if the Court views congressional intent on the counseling and referral issue as ambiguous, however, it should not accord much weight to the newly devised administrative construction proffered by HHS. It is well-established that regulations that are neither consistent nor longstanding are entitled to little deference. *See, e.g., Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 646 n.34 (1986); *Cardoza-Fonseca*, 480 U.S. at 446-47 n.30; *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987).[17] The regulations challenged here

[17] *Chevron*, which predates the cited cases, does not alter this principle. In *Chevron*, this Court found that an agency's continuing revision of regulations governing industrial air pollution was in response to an objective change of

(Footnote continued)

reverse a longstanding agency policy that permitted nondirective counseling and referral for abortion. This prior interpretation, and not the newly minted one devised by HHS, provides persuasive evidence of congressional intent.[18]

Not once, in the 17 years after the enactment of Title X, did the Secretary even suggest that § 1008 restricted family planning services so as to bar the provision of information about or referral for abortion. Departmental interpretations under both Republican and Democratic administrations were consistently to the contrary.[19]

The agency first promulgated regulations to govern the program in 1971, during President Nixon's administration. 36 Fed.

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conditions within the industry. The change in regulations did not, therefore, lessen the deference accorded to the agency. This case, however, does not involve any objective change of conditions within the field of family planning.

[18] First, it was adopted contemporaneously with the passage of the statute. *See NLRB v. United Food*, 484 U.S. at 124 n.20; *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986). Second, the government agency charged with administering the law (originally, HEW) was active in the legislative process and consequently had special knowledge of what the legislature intended. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983). Third, the agency's contemporaneous construction had remained consistent for 17 years. *See EEOC v. Associated Dry Goods Corp*, 449 U.S. 590, 600 n.17 (1981); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972); *cf. Bowen v. American Hosp. Ass'n*, 476 U.S. at 646 n. 34.

[19] In fact, since 1971, HHS has repeatedly explained why § 1008 does not prohibit abortion-related referral and counseling in Title X projects. First, because nondirective counseling of pregnant women regarding available options and "mere referral" for abortion are simply informational, they do not "promote or encourage" abortion. *See* Memorandum from C. Conrad, Senior Attorney, Pub. Health Div., to E. Sullivan, Office for Family Planning (Apr. 14, 1978) (56JA). Second, referral of clients for abortion when contraception fails or when abortion is medically indicated does not violate § 1008 because in such instances abortion is not "a method of family planning." Memorandum from C. Conrad, Senior Attorney, Pub. Health Div., to E. Sullivan, Office for Family Planning (July 25, 1979) (63JA). Third, nondirective counseling is not only permitted under § 1008 but is required by the Code of Ethics of the AMA. Memorandum from L. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, to H. Connor, M.D., Regional Health Adm'r (November 19, 1976) (74a).

Reg. 18465 (1971). Giving shape to the comprehensive nature of the program, the agency required all Title X grantees to provide "medical services related to family planning including . . . necessary referral to other medical facilities when medically indicated," and "social services related to family planning, including counseling . . . ." 36 Fed. Reg. 18465, 18466 (1971) § 59.5(d). Title X grantees were also specifically required to make provision for "coordination and use of referral arrangements with other providers of health care services. . . ." *Id.* at 18466 § 59.5(i). These contemporaneous regulations also acknowledge that the funding prohibition of § 1008 is limited to the abortion procedure. 37 Fed. Reg. 26594 (1972) § 59.5(a)(9) ("Projects will not *provide abortions* as a method of family planning") (emphasis added). Until early 1988, these regulations remained virtually unchanged.

Furthermore, the first Five Year Plan that the Secretary submitted to Congress indicated that referrals for abortions would be appropriate in some circumstances:

> Within the context of family planning services programs, abortions are not viewed as a method of fertility control but as a service that should be available in accordance with local laws only in the event of a human or contraceptive method failure.

HEW National Center for Family Planning Services, Health Services and Mental Health Administration, *A Five Year Plan for Family Planning Services* 319 (1971); *id.* at 318.

Interdepartmental interpretations confirmed that § 1008 was a narrow prohibition. Only months after Title X was enacted, the Office of General Counsel wrote that § 1008 prohibited only the *provision* of abortions.[20] Contrary to the Secretary's revisionist view that "requirements for options counseling and abortion referral were first announced in 1981," Pr., 53 Fed. Reg. 2923 (318A), the first Program Guidelines issued by HHS under Title X specifically directed grantees to provide "pregnancy counseling" as appropriate and referral "for *any* needed services

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[20] *See* Memorandum from J. Mangel, Deputy Asst. General Counsel, HEW, to L. Hellman, M.D., Deputy Asst. Sec'y for Population Affairs (Apr. 20, 1971) (39JA) (". . . inasmuch as the collection of data does not itself involve the provision of abortions, section 1008 would not, from a literal reading appear applicable").

not furnished through the facility." *Program Guidelines for Project Grants for Family Planning Services* 16 (1976) (emphasis added). There is no exclusion of abortion from these counseling and referral requirements; in fact, the 1976 *Guidelines* specifically directed grantees to discuss abortion with a patient when a pregnancy was discovered with an IUD in place. *Id.* at 15.

These requirements were retained and reinforced in the 1981 *Guidelines*.[21] The 1981 *Guidelines* list services that "*must* be provided" by Title X recipients as including (1) referrals for "pregnancy management," (2) "education on the benefits and risks of the various contraceptive alternatives," and (3) at the patient's request, "information on options for the management of an unintended pregnancy," including "non-directive counseling" on "[p]renatal care and delivery," "[i]nfant care, foster care, or adoption," and "[p]regnancy termination". 1981 *Guidelines* §§ 7.4, 8.0, 8.6 (emphasis in original). HHS interpretive opinions have reiterated this view. For example, in a 1978 legal opinion, HHS concluded that under § 1008 a Title X project may "[s]upply information to those who do not want to continue their pregnancies, and may be interested in obtaining abortions," and "[r]efer clients to doctors to obtain abortions." Memorandum from C. Conrad, Office of Gen. Counsel, to E. Sullivan, Office for Family Planning (Apr. 14, 1978) (56JA).[22]

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[21] In the past, this Court has considered agency guidelines in determining legislative intent. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)). The court of appeals in this case accorded no discernible weight to HHS program guidelines.

[22] *See also* Memorandum from L. Belmonte, Regional Program Consultant, Office for Family Planning (May 25, 1979) ("[t]he provision of information on abortion *services* and the mere referral of a patient to another provider for such a procedure are permissible") (75a); Memorandum from L. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, to H. Connor, M.D., Regional Health Adm'r (Nov. 19, 1976) (74a). The agency later confirmed that Title X *required* "referral to a provider who might recommend or provide an abortion in cases where such a referral is necessary because of the patient's medical condition or the condition of the fetus . . . [A] project could not — consistent with § 59.5(d) — refuse as a matter of policy to make such referrals in *any* case, regardless of the medical indications therefor." Memorandum from C. Conrad, Senior Attorney, Pub. Health Div., to E. Sullivan, Office for Family Planning, (July 25, 1979) (62JA).

4. *The Regulations Are Arbitrary and Capricious*

Not only do the agency's regulations frustrate the goals of Congress, they also reverse a 17 year old policy permitting nondirective counseling and referral for abortion without articulating an adequate, reasoned basis for the change. As this Court has held, "[a]gency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action". An agency must "explain the rationale and factual basis for its decision". *Bowen v. American Hosp. Ass'n*, 476 U.S. at 626-27.

When an agency changes its course, it must provide a "reasoned analysis for the change," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), and a "rational connection between the fact found and the choice made." *Id.* at 43, quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). This Court should carefully examine the Secretary's interpretation to see if the agency has

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs., 463 U.S. at 43. If the Secretary's explanation and rationale are deficient, the regulations should be stricken as arbitrary and capricious.

The Secretary articulated two bases for his radical change in interpretation of § 1008. First, he claims that § 1008 *requires* a prohibition on nondirective counseling and referral for abortion. Pr., 53 Fed. Reg. 2923 (318A). As the foregoing discussion shows, such is not the case. *See supra* pp. 11-19. Second, the Secretary concludes, in the exercise of his "general administrative discretion", that the current guidelines "do not faithfully and effectively maintain the prohibition contained in § 1008." *Id.* He cites two grounds for this conclusion: (1) that the language in prior guidelines fails to offer "clear and operational guidance" to grantees for preserving the distinction between Title X programs and abortion as a method of family planning; and (2) that

the Office of the Inspector General ("OIG") and the GAO had urged the Secretary — five years earlier — to give more formalized direction to grantees on the prohibition in § 1008. *Id.*

In 1982, the GAO reported that the specifics of the Department's abortion policy were contained only in legal opinions issued by its Office of General Counsel, *id.* at 2934 (107JA); that only some of the clinics reviewed for the report had received copies of the legal opinions, GAO Report at ii (86JA); and that the Secretary therefore should clarify the Department's policy by incorporating it into the program regulations and guidelines. Pr., 53 Fed. Reg. 2924 (319A); GAO Report at 22 (121JA). The OIG agreed that the Department should provide "specific program guidance regarding the scope of § 1008." Pr., 53 Fed. Reg. 2924 (319A). The GAO Report specifically concluded that there was "no evidence that Title X funds had been used for abortions or to advise clients to have abortions", and "no indications that any women were advised or encouraged to have abortions." GAO Report (84, 86JA).

The facts underlying the Secretary's decision thus are contained in reports finding that Title X clinics do *not* advise or encourage clients to have abortions, and finding that the Department's legal opinions should be formalized and disseminated. Yet, rather than following these recommendations, the Secretary revamped the Department's seventeen-year old interpretation and issued a total ban on nondirective counseling and referral. There is no rational connection between the facts in the record and the Secretary's decision. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

In addition, the new regulations conflict with a letter the Secretary wrote one year before the Proposed Rules were published in the Federal Register. On August 1, 1986 five members of Congress — after meeting with HHS and getting "no action" — wrote the Reagan Administration urging it to *require* HHS to change the regulations so that anti-abortion counseling centers could qualify for grants. Letter from Rep. Christopher H. Smith, *et al.*, to Donald T. Regan (Aug. 1, 1986) (98-99JA). The Secretary himself responded, explaining that the restrictions would be changed so that anti-abortion grantees would no longer be required to counsel and refer for abortion, but "grantees who wish to provide counseling and referral on all pregnancy

options, including abortion, will still be permitted to do so. . . ." Letter from Secretary Otis R. Bowen to Hon. Vin Weber (Aug. 19, 1986) (139A).

One year later, in the Proposed Rules, the Secretary was still responding to the concern that organizations that refuse to counsel or refer for abortion were ineligible for Title X grants, but without explanation, his response had veered from *permitting* nondirective counseling and referral for abortion to *prohibiting* it. 52 Fed. Reg. 33212; Section 59.8(a) (20-21A). In the Final Rules, the Secretary again failed to explain his revisionist position. 53 Fed. Reg. 2929 (324A). In light of the 1986 letter, the Secretary was obliged, at the very least, to consider whether the regulations could be modified to *permit* counseling and referral for abortion without *requiring* it. *See Motor Vehicle Mfrs.*, 463 U.S. at 46. No such explanation or consideration appears in the record.

It is clear that the administrative record cannot rationally form the basis for the Secretary's about-face. What really prompted the Secretary to act was political pressure to bring the Title X program into line with the Reagan Administration's position on abortion. *See* Letter from Rep. Christopher H. Smith, *et al.*, to Donald T. Regan (Aug. 1, 1986) (98-99a). Indeed, the Secretary has conceded that the new regulations are the result of a shift in the political climate. *See* Tr. of oral argument at 52 (394A), *id.* at 54 (396A). HHS does not even disavow the patent bias of the regulations in favor of childbearing and against abortion. Pr., 53 Fed. Reg. 2943 (338A).

Various provisions of the new regulations are so overbroad that they reflect only a desire to placate political critics. For example, a Title X clinic must refer pregnant clients for prenatal care by distributing a list of providers that promote the welfare of mother and unborn child, § 59.8(a)(2), regardless of their medical or professional capabilities. § 59.8(a)(3). Indeed, the regulations go so far as to forbid Title X clinics from providing the yellow pages of an ordinary telephone book to a patient requesting information on abortion. *See New York v. Sullivan*, 889 F.2d at 415, 416-17 (Cardamone, J., concurring and Kearse, J., dissenting); 53 Fed. Reg. 2942 (337A). Any explanation for these regulations would be so "implausible that it could not be

ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs.*, 463 U.S. at 43.

Although an agency may, in some circumstances, "properly rely upon the incumbent administration's view of wise policy to *inform* its judgments," *Chevron*, 467 U.S. at 865 (emphasis added); *Motor Vehicle Mfrs.*, 463 U.S. at 59 (Rehnquist, J., dissenting), it must not rely on factors Congress had not intended it to consider. *Id.* at 42-43. HHS has utterly failed here to justify the total reversal of its 17 year old policy.

B. The Requirement Of "Physical And Financial Separation" In Section 59.9 Of The Regulations Is Both Contrary To The Intent Of Congress And Arbitrary And Capricious

1. *Congress Did Not Authorize The Physical Separation Requirement*

The program integrity regulations require that a program receiving Title X funds be physically separated from programs that engage in activities prohibited by the statute or the Secretary's new regulations. The Second Circuit treated this separation requirement as if it were a "specific restriction[] embodied in" the statute. *New York v. Sullivan*, 889 F.2d at 410. Nothing in the language of § 1008, however, indicates that Title X programs must be physically isolated from other health care programs. On the contrary, the statute *requires* state authorities to submit a plan "for a *coordinated and comprehensive* program of family planning services". 42 U.S.C. §300a(a) (1982) (emphasis added). The segregation requirement of the new regulations in fact contradicts this requirement, as the First Circuit recognized. *Mass. v. Sec'y*, 899 F.2d at 59-60.

The legislative history confirms the statutory language. As discussed above, the original Conference Report expressly noted that § 1008 was not intended to burden programs supported by funds other than Title X. *See supra* p. 16. To the extent that independently supported programs may provide abortion-related services, the Secretary's separation requirements interfere with and limit those programs in a manner directly contrary to Congress' express intent. In addition, the regulations run afoul of the congressional

desire to avoid burdening programs funded by private sources or a state.[23]

Thus, the separation requirement obstructs the statutory goal of "making comprehensive voluntary family planning services readily available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504 (1970). Many Title X programs share facilities and personnel with programs that provide abortions or services that the Secretary now deems violate § 1008.[24] The new regulations would require many clinics either to give up their Title X funding or terminate family planning services altogether. *See* Gesche ¶ 18 (175-76JA); Fink ¶ 13 (165-67JA). By contracting the scope of available family planning services the new regulations directly contradict Congress' stated desire to expand those services.

The legislative history of Title X also demonstrates that Congress intended to achieve the goal of expanded access to family planning services by integrating, to the maximum extent feasible, family planning and other health care programs. *See, e.g.*, H.R. Rep. No. 1472, 91st Cong., 2d Sess. 10 (1970) ("The project

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[23] New York was cognizant of this scheme and also desired to establish and support financially an efficient and coordinated delivery system. For example, under state law, grants made by NYSDOH to family planning and other health care providers must be awarded on the basis of a competitive process where consideration is given to factors such as the project's ability to increase and improve access to health care services for poor and underserved populations. N.Y.S. Pub. Health Law § 2807-b. The new regulations will in fact make impossible efforts to maximize services and improve access, since family planning providers under New York law must provide nondirective counseling and abortion referrals and will thus be ineligible for Title X funds. *See* Part II, A, 3, *infra*.

Congressional intent to preempt or impair state regulation in areas of traditional state concern, especially in areas of health care and medical regulation, must be supported by a clear indication of intent and will not be inferred. *Bowen v. American Hosp. Ass'n*, 476 U.S. at 644. *See also Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (noting the "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause"). Here, Congress has expressed its intent that programs run in accordance with state and local laws *not* be interfered with by Title X.

[24] In 1982, for example, HHS estimated that 74 organizations receiving Title X funds also performed abortions at clinics co-located with the Title X clinics. GAO Report (85JA).

grants under this legislation would permit the establishment of *coordinated*, community-based programs in hospitals and public or private health agencies. . . . Some projects would be hospital based. . . others would use outpatient clinic services") (emphasis added). The separation requirement is utterly inconsistent with this legislative preference for integrated family planning programs.

Subsequent legislative history confirms that Congress did not intend to build a wall around Title X projects. In 1974, a House Committee Report commended HHS for capturing "the intent of the legislation to make family planning services widely available" by beginning "the integration of comprehensive family planning services into other health care settings . . . highlight[ing] the preventive health nature of family planning services and the value of such services as an integral part of ambulatory health care." H.R. Rep. No. 1161, 93d Cong., 2d Sess. 15-16 (1974).[25]

Furthermore, the Report of the Senate Labor and Public Welfare Committee for the 1975 reauthorization of Title X declared:

> The Committee encourages the use of funds otherwise authorized by this bill for the provision of family planning services, not only in specialty clinics, but, where such facilities do not exist or are impractical, in entities devoted to comprehensive health care for low-income families. . . . [I]t is essential that there be close coordination and, wherever possible, integration of family planning services into all general health care programs.

S. Rep. No. 63, 94th Cong., 1st Sess. 65-66 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 469, 528; *see also* H.R. Rep. No. 191, 95th Cong., 2d Sess. 30 (1978); H.R. Rep. No. 118, 95th Cong., 1st Sess. 10 (1977); H.R. Rep. No. 161, 93d Cong., 2d Sess. 21 (1974). Although Congress has been repeatedly advised that the integration of Title X projects with general health care facilities results in some Title X programs being located "down the hallway" from abortion providers, 124 Cong. Rec. 37046 (1978) (statement of Rep.

[25] The Conference Committee on the 1974 reauthorization of Title X was even more explicit on the need for integration to facilitate the statutory goal of wide access to family planning services: "[T]he conferees believe that family planning services under Title X are most effectively provided in a general health setting and thus encourage coordination and integration into programs offering general health care." H.R. Conf. Rep. No. 1524, 93d Cong., 2d Sess. 58 (1974).

Rogers), it has steadfastly maintained the policy favoring integration. In fact, a 1978 amendment proposed by Rep. Dornan, which would have been identical in effect to § 59.9 of the new regulations, was defeated. 124 Cong. Rec. 37046 (1978).

In the past, HHS has interpreted § 1008 to have no effect on activities funded by sources other than Title X. During the first year of the program's operation, HHS issued an opinion letter making clear that Title X-funded organizations could continue to use non-federal funds for whatever activities they wished, including the provision of abortions.

> We do not believe the word 'program,' as used in § 1008, was intended to be so comprehensive as to include any and all family planning activities carried on by an applicant for Title X funds. For example, we do not believe that a hospital offering abortions for family planning purposes, consonant with State law, would be disqualified from receiving Title X funds. . .

Memorandum from J. Mangel, Deputy Assistant Gen. Counsel, to L. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971) (38JA); *see also* 124 Cong. Rec. 31241-42 (1978).

This conclusion was consistent with the agency's belief that Title X required "coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other Federal programs." 42 C.F.R. § 59.5(b)(8)(1986). Thus, the agency has never required separate facilities or any of the other indicia of "separation" listed in § 59.9. Indeed, the GAO report itself rejected the notion that physical separation was necessary for compliance with § 1008. *Id.* at 14 (108-09JA).

Despite clear congressional intent to the contrary, § 59.9 makes it impossible for Title X projects to make unrestricted use of non-Title X funds or to integrate within a general health care setting.[26] Such a restrictive interpretation of § 1008 has been rejected

[26] Although the Preamble to the new regulations protests that only Title X funds are affected, *e.g.*, Pr., 53 Fed. Reg. 2925, 2942 (320, 337A); *but see id.* at 2922 (317A) ("section 1008 extends to all activities conducted by the federally

(Footnote continued)

by Congress and previously had been eschewed by the agency. Because the separation requirement "cannot be reconciled with the statute [it] purport[s] to implement," *Sullivan v. Zebley*, 110 S. Ct. 885, 890 (1990), the Secretary has exceeded his statutory authority.

2. *The Physical Separation Requirement Is Unjustified*

The Secretary's call for a physical "wall of separation" between Title X facilities and those offering abortion-related services, Pr., 53 Fed. Reg. 2922 (317A), is entirely new and, as with the radical reversal of the counseling and referral rules, this expansion of the previous policy must be justified by reasoned analysis in the record. *Motor Vehicle Mfrs.*, 463 U.S. at 42.

In the Proposed Rules, the Secretary defined the requirements of "separateness:" separate waiting, consultation, examination and treatment rooms; separate names, addresses, telephone numbers, receptionists, exits, and entrances; and separate financial, accounting, personnel and medical record systems. § 59.9(a). The comments criticized the Proposed Rules because they imposed prohibitive costs for duplicating facilities and personnel; they would force interruptions in service by requiring providers to change locations and hire new personnel, and in some cases would force providers out of the Title X business because of various state restrictions on duplicative facilities; and because the rules unreasonably fragmented the provision of medical services. 53 Fed. Reg. 2939 (334A).

Rather than specifically addressing or rebutting any of these concerns, the Secretary tried to end-run the issue by revising the Final Rules to eliminate the illustrative examples and to provide for compliance decisions on a case-by-case basis. *Id.* at 2940 (335A). However, the Final Rules still permit the Secretary to base his compliance decision on *any or all* of the factors criticized. § 59.9.[27]

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funded project, not just the use of federal funds for abortions within the project"), the plain terms of the regulations state otherwise. Section 59.9 imposes substantial restrictions on the use of non-Title X funds by requiring physical separation of activities performed with those funds from a Title X project.

[27] Section 59.9 lists several factors for consideration, but provides that the relevant factors are not limited to those listed.

For example, although the failure to have a separate entrance and exit — a requirement that "caused the most concern regarding costs" under the Proposed Rule — no longer would constitute a *per se* violation, the Secretary will still consider it as a factor. 53 Fed. Reg. 2940 (335A). Yet the Secretary offered no rebuttal to the comments suggesting that costs for providing separate entrances and exits would be significant and even prohibitive. Similarly, although the co-siting of a Title X clinic and a program that provides genetic screening and counseling — the "example typically cited" in the comments opposed to the regulations — would not constitute a *per se* violation, it could still be considered as a factor. *Id.* at 2941 (336A).

The Secretary directly undercuts his own rationale for the physical separation requirements — that § 1008 "mandates" separation — by claiming that the case-by-case approach will be implemented with a "greater understanding and sensitivity" to the costs imposed. *Id.* at 2940 (335A). Clearly, these requirements are not "mandated" if they can be disregarded at the Secretary's discretion. The administrative record contains no support for the Secretary's broad physical separation requirements, and they should be stricken as arbitrary and capricious.

C. The Regulations Raise Serious Constitutional Problems For Title X

Even if the agency's interpretation is otherwise permissible, it is not entitled to deference where it raises serious constitutional problems. In such a case, this "cardinal principle" of statutory construction requires that the statute be construed so as to avoid the constitutional problems, unless the construction would plainly contradict congressional intent. *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr.*, 108 S. Ct. 1392, 1397 (1988) *and cases cited therein*. In applying this rule, the Court should uphold the agency's interpretation only if there is the "clearest indication in the legislative history" of support for the agency's construction. *NLRB v. Drivers*, 362 U.S. 274, 284 (1960); *DeBartolo*, 108 S. Ct. at 1398-99. Given the constitutional problems here, and the absence of congressional support for the limitations on counseling and referral or the new requirements of physical and financial separation, the regulations should be rejected.

II. THE REGULATIONS ARE UNCONSTITUTIONAL

A. The Regulations Violate First Amendment Rights

1. *Section 59.8 Contains Content- and Viewpoint-Discriminatory Restrictions on Speech In Violation of the First Amendment*

Section 59.8 represents an unlawful intrusion by the federal government into the highly private and personal dialogue between a pregnant woman and the Title X physician.[28] By suppressing speech about abortion and compelling speech about childbirth, HHS seeks to transform what should be a free exchange of information and ideas tailored to the needs of the individual patient into a tool for promoting the federal government's anti-abortion ideology. In so doing, the federal government has impermissibly infringed on the First Amendment rights of the physician to convey, and the patient to receive, medical information.

Physician-patient communications serve important public and private values underlying the First Amendment. Full communication enables the patient to choose a course of treatment most suited to his or her needs, *i.e.*, it promotes personal autonomy.[29] For society, the critical interest in public health can only be assured by protecting the free flow of medical information between doctor and patient. Thus, "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The public health and the individual's interest in self-determination can be served only if doctor and

[28] Much, if not most, counseling of pregnant women in Title X clinics is performed by health professionals other than physicians; however, it is the quality of the counseling and not the identity of the person giving it which is important. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 447-49 (1983). Moreover, physicians under whose supervision Title X counselors work remain ultimately responsible for the informed consent process. *See* N.Y. Comp. Codes R. & Regs. tit. 10, §§ 751.4, 751.9 (1987); *Hoffson v. Orentreich*, 144 Misc. 2d 411, 414 (Sup. Ct. N.Y. Co. 1989).

[29] It is basic to American jurisprudence that "[e]very human being of adult years and sound mind, has a right to determine what shall be done with his own body." *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (quoting *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125 (1914)). *Cf. Cruzan v. Missouri Dep't of Health*, 58 U.S.L.W. 4916, 4920 (June 25, 1990).

patient can freely communicate. Suppression of information about abortion and compulsion of speech about childbirth forces physicians to violate principles of sound medical practice to the detriment of their patients' health, and promotes uninformed decision-making by women.

Section 59.8 ensures that as little information as possible about abortion gets to the pregnant woman, so as to maximize the chances that she will carry her pregnancy to term. It requires that regardless of her medical circumstances, a woman diagnosed as pregnant must be provided with "a list of available providers that promote the welfare of mother and unborn child". § 59.8(a)(3). This list cannot be used "as an indirect means of encouraging nor promoting abortion . . . such as by weighing the list of referrals in favor of health providers which perform abortions". Thus, although prenatal care providers who may perform some abortions can appear on the list, no abortion provider "whose principal business is the provision of abortions" can be included. *Id.*[30] Moreover, the referral list must include prenatal care providers who neither perform abortions nor offer abortion counseling. *Id.* A direct request from the woman for information about or referral for abortion must be met with a statement to the effect that "the project does not consider abortion an appropriate method of family planning", but that the project can help her obtain prenatal care, together with a proffer of the aforementioned list. § 59.8(b)(5). Finally, the physician must in every instance provide the woman with "information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." § 59.8(a)(2).[31] Indisputably, this is viewpoint-based discrimination.[32]

[30] This requirement effectively eliminates from the list all providers that would be affordable to low-income women. Henshaw ¶ 3-4(82a). Seventy percent of abortions nationally and 73.5 percent of those in New York are performed at clinics that "principally" provide abortions. Henshaw ¶ 4 (82a). Other providers, such as hospitals, charge much more for abortion services and would thus not be a realistic alternative for most Title X patients. *See* Drisgula ¶ 28 (156JA); Gordon ¶ 7 (181-82JA).

[31] These instructions belie the Secretary's claim that they are needed to ensure that Title X monies be used only for "preconceptional" family planning. *See* § 59.2. Prenatal counseling, as well as referral to prenatal care providers, is an indispensable part of the script mandated by § 59.8.

[32] The restrictions do not have to require "[a]rgumentation pro or con as to the advisability of an abortion", to be viewpoint-discriminatory, as the court of

(*Footnote continued*)

Dictating the content of the dialogue is a profound violation of the health care provider's First Amendment rights. Compelling physicians to convey a distorted message to their patients either by withholding medically necessary information or by reciting medically unnecessary information, intrudes on their ability to exercise their best medical judgment and places them in the "undesired and uncomfortable straitjacket" which this Court repeatedly has deplored. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1975).

Like the statute invalidated in *Thornburgh v. Amer. College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the Secretary's restrictions "attempt to wedge [the government's] message discouraging abortion into the privacy of the ... dialogue between the woman and her physician." *Id.* at 762. The regulations specify an entire area about which the physician may dispense no information whatsoever, "regardless of whether in his judgment the information is relevant to [the patient's] personal decision." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 445 (1983). Moreover, compelling physicians to be the unwilling bearer of the government's anti-abortion message violates their First Amendment rights. *See Wooley v. Maynard*, 430 U.S. 705 (1977); *see also Akron*, 462 U.S. at 472 n.16 (O'Connor, J., dissenting) (recognizing that a serious First Amendment question arises from compelling speech by a health provider in an informed consent dialogue).[33]

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appeals suggested. 889 F.2d at 414. The regulations *do* require the physician, if asked by the woman about abortion, to say something expressing disapproval of the idea, § 59.8(b)(5). But even if the regulations were simply seen as excluding all mention of abortion, they would run afoul of free speech guarantees, since "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition ... of an entire topic." *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). *See also Boos v. Barry*, 108 S. Ct. 1157, 1163 (1988).

[33] The fact that these speech restrictions force physicians to deviate from sound medical practice, and to disregard medical ethics, highlights their impermissibility. Mainstream medical opinion recognizes the necessity for full disclosure of all alternatives so the patient may give a truly informed consent. The *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* (AMA) state: "The physician has an ethical

(*Footnote continued*)

It is no answer to the coercive effect of the speech restrictions of § 59.8 that Title X grantees can speak about abortion through independently funded affiliates. *See* 53 Fed. Reg. at 2935; *cf. id.* at 2925 (330A). For while it is true that the government may impose a wider variety of funding restrictions when the recipient remains free to effectuate its free speech rights through an independently funded affiliate, *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983); *FCC v. League of Women Voters*, 468 U.S. 364, 400-01 (1984), here, formation of an affiliate does nothing to protect the precise First Amendment rights at issue. By its very nature, physician-patient communication is an intensely private affair which requires the exchange of information between particular individuals at a particular time. Permitting the physician on some other occasion to speak freely to some other patient through an affiliate affords no protection to the Title X patient.[34]

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obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." Opinion 8.07. Sammons ¶ 3 (261-62JA); Katz ¶ 9 (208JA). The Standards of the American College of Obstetricians & Gynecologists (ACOG) state that "the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy." Morley ¶ 19 (230JA). In 1982 the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research wrote: "[A] physician is obliged to mention all alternative treatments, including those he or she does not provide or favor, so long as they are supported by respectable medical opinion." Katz ¶ 11 (Exh. B) (209JA). The requirement that the referral list be undifferentiated also violates well-established standards of medical ethics. Opinion ¶ 3.04 states that referrals should be based on a physician's judgment that what would be in the best medical interests of the patient. (284A).

The Secretary claims that a requirement of abortion counseling will conflict with some health professionals' ethical beliefs and that there is "no absolute ethical imperative upon physicians to counsel or refer for abortion". Pr., 53 Fed. Reg. 2932 (327A). In fact, while physicians may have a right not to provide treatment they find morally objectionable, they do not have a right to withhold information about treatment from their patients. Sammons ¶ 15 (267JA).

[34] Even the Title X physician's First Amendment right to speak through an affiliate could be chilled by the regulations. Section 59.9, which requires physical and financial separation of Title X-funded and independently-funded facilities engaging in abortion related activities, uses the existence of separate personnel as one of the indicia of separation to be examined by the Secretary. Thus doctors, already gagged at Title X clinics, may be understandably reluctant to provide any abortion counseling outside of the Title X setting.

Suppression of abortion-related speech also violates the rights of patients because the First Amendment encompasses the right to receive information and ideas. *Board of Education v. Pico*, 457 U.S. 853, 866 (1982); *see also Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972). It is antithetical to the values underlying the First Amendment for government to seek to promote its message by preventing its intended audience from hearing the 'opposing' or disfavored idea. This Court rejected just such a "paternalistic" approach in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), stating that the "alternative [approach] is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed and that the best means to that end is to open the channels of communication rather than close them . . . " *Id.* at 770.

The pregnant woman's First Amendment right to receive information about abortion is especially urgent because she is dependent upon her doctor to give her the information she needs to make a truly informed choice. *Cf. Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-42 (1985). Central to the physician-patient relationship is trust; the woman must be able to rely upon her doctor's advice. Katz ¶¶ 7, 8 (207JA). Given the fact that the population served by Title X clinics is disproportionately poor and/or young, the fiduciary duty of the physician to the patient becomes even more critical. *See* Gesche ¶¶ 6-7 (171JA); Pasternack ¶ 14(f) (674A); Rust ¶ 15 (253-54JA); S. White ¶ 13 (87a); M. White ¶ 6 (279-80JA); Murray ¶ 6 (235JA); Merrens ¶ 15 (95a). As the concurring judge in the court of appeals acknowledged, many women, unaccustomed to regular reproductive health care, will be affirmatively misled by the incomplete counseling into believing they have no alternative to carrying the pregnancy to term. *See* 889 F.2d at 415 (Cardamone, J., concurring). *See also Virginia Bd. of Pharmacy*, 425 U.S. at 763.

The consequences of receiving incomplete or misinformation are all too real for the pregnant woman. Women with conditions such as diabetes, heart disease, cancer, and AIDS, will be deprived of necessary counseling and information, *e.g.*, that abortion is an option which will directly affect their health. Sammons ¶¶ 8-9 (263-64JA); Rosenfield ¶¶ 10-15 (681-84A); Morley

¶ 17 (228-29JA).[35] Moreover, certain maternal disorders such as diabetes or rubella greatly increase the risk of prenatal mortality and morbidity. Medical ethics dictate that such women should be given information on the abortion option, given the severe risks certain diseases pose for the fetus. Sammons ¶ 10 (264-65JA); Rosenfield ¶¶ 19-20 (686-87A). Even those women who want abortion and are knowledgeable enough to see past the physician's silence could be harmed by the delay incurred in finding a provider, as it is well established that abortions performed at later stages of pregnancy are more hazardous. Morley ¶ 12 (227JA).

There is no doubt that the speech restrictions of § 59.8, if applied to unsubsidized family planning clinics, would constitute an impermissible infringement of First Amendment freedoms. Yet the fact that these restrictions on speech occur in the context of a government funded program does not render them any the less unlawful. The Secretary's attempt to structure a funded informed consent dialogue to exclude all mention of abortion, when the generally accepted practice would be to include it, goes far beyond a mere refusal to fund abortion procedures. The suppression of speech here is designed to steer the woman toward a governmentally approved course of action which may be contrary to her best medical interests. While a governmental preference for childbirth over abortion may be legitimate, promotion of that interest through uninformed decisionmaking most assuredly is not.[36] Thus, *Maher v. Roe*,

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[35] The regulation's exception to the referral ban in cases of "emergency", § 59.8(a)(2), is not sufficient to override these serious health concerns. To judge from the illustration in § 59.8(b)(2), "emergency" is meant to encompass only those conditions, such as ectopic pregnancies, which constitute an immediate threat to the woman's health. Many of the aforementioned diseases do not immediately threaten the woman's life, but are nonetheless serious. *See Rosenfield* ¶ 21(a) and (b) (687-88A).

[36] Whether the federal government could fund a network of federal clinics, staffed by federal employees, and require them to mouth the official line on abortion is not the issue here. Receipt of Title X funds does not transform the clinics into instruments of the federal government. Title X authorizes grants to any "public or nonprofit private entity" meeting the statutory eligibility requirements, 42 U.S.C. § 300(a), and the staff working in the clinics continue to be private, state or county employees. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1008-09 n.19 (1982). *See also Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 777 (1982) (O'Connor, J., concurring in

(*Footnote continued*)

432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980), which stand for the proposition that the federal government may make "a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds", *Maher*, 432 U.S. at 474, are inapposite.[37]

In *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), this Court held that the government could not exempt certain publications but not others from a sales tax because "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Id.* at 230. The Court so held despite the fact that the distinction was viewpoint-neutral and that there was "no evidence of an improper censorial motive." *Id.* at 228. Here, by contrast, the regulations are viewpoint discriminatory; the Secretary has candidly acknowledged that their purpose is to suppress speech about abortion. Pr., 53 Fed. Reg. 2929 (324A).[38] For similar reasons in *League of Women Voters*, 468 U.S. 364, this Court struck down a ban on editorializing by noncommercial broadcasting stations receiving federal funds, calling it "'the purest example of a "law . . . abridging the freedom of speech, or of the press,"'" *id.* at 384 (quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring)). While Congress may choose to use its spending powers to "subsidize [ ] some, but not all speech", *Regan*, 461 U.S. at 548, it may not "discriminate

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the judgment in part and dissenting in part) (states and their agencies do not become "field offices of the national bureaucracy" by their receipt of federal monies).

[37] Several Justices of this Court recently noted that a serious controversy would arise if government regulations prohibited publicly employed health professionals from giving specific medical advice to pregnant women. *See Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040, 3060 (O'Connor, J., concurring), 3068-69 n.1 (1989) (Blackmun, Brennan and Marshall, J J., concurring in part and dissenting in part).

[38] Even the dissenters in *Arkansas Writers* conceded that should the government manipulate subsidies so as to produce a "significant coercive effect . . . the courts [would] be available to provide relief" and recommended "a more stringent, prophylactic rule . . . when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern." *Id.* at 237 (Scalia, J., and Rehnquist, C.J., dissenting).

invidiously in its subsidies in such a way as to "'ai[m] at the suppression of dangerous ideas.'" *Id.* at 548 (citations omitted). *See also League of Women Voters*, 468 U.S. at 407 (Rehnquist, J., dissenting).[39]

The consequences for the woman and the physician of restricting speech in an informed consent dialogue are more immediate and palpable than the consequences of an editorializing ban on the listening and viewing audience, or of a tax exemption denial on certain magazine publishers. The women who rely on Title X-funded clinics for their reproductive health care may have no alternative facilities.[40] Women, including those for whom abortion is medically indicated, may not know that they have received incomplete information until it is too late. Some women who want abortions may be cowed into foregoing their right to choose abortion because they think the government (or the physician) disapproves. *See Mass. v. Sec'y*, 899 F.2d at 73.

Since the counseling and referral bans significantly impair First Amendment rights, they cannot survive scrutiny unless they are supported by a compelling state interest and are narrowly tailored

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[39] The principle that government may not allocate its resources in a viewpoint discriminatory way also applies where the government subsidizes speech by allowing speakers access to a channel of communication, even when that channel is not a traditional or even limited public forum. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 806 (1985); *id.* at 833 (Stevens, J., dissenting); *cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *see also United States v. Kokinda*, 58 U.S.L.W. 5013 (June 27, 1990); *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 131 n.7, 132 (1981). The language of Title X and history of administrative enforcement make it clear that the federal government, at the very least, has designated Title X projects nonpublic forums for discussion of pregnancy options. And while the government may reserve these nonpublic forums for their "intended purposes, communicative or otherwise, . . . the regulation on speech [must be] reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. *See also American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986).

[40] Government speech in the Title X context may distort the marketplace of ideas because of its dominance in the field. *Cf. Webster v. Reproductive Health Serv.*, 109 S. Ct. at 3052 n.8 (1989).

to serve that interest. *See, e.g., Arkansas Writers'*, 481 U.S. at 231. Here, the government's interest is not merely to encourage childbirth over abortion, but to suppress information about abortion so that uninformed women will carry their pregnancies to term. Promoting ignorance about the exercise of a constitutional right is not a legitimate, let alone compelling, governmental interest. *See Planned Parenthood Ass'n Chicago Area v. Kempiners*, 568 F. Supp. 1490, 1499 (N.D. Ill. 1983).[41]

Even if the federal government has articulated a sufficient interest for the regulations, they are nonetheless unconstitutional because they are not narrowly tailored. The ban on abortion information, argues the Secretary, is necessary because *any* speech about abortion in a counseling context tends to promote or encourage abortion. *See* Pr., 53 Fed. Reg. 2933 (328A). Yet the evidence shows that Title X grantees engage only in nondirective counseling. *See, e.g.*, Tiezzi ¶ 8(a) (272-73JA); Merrens ¶ 7 (635-36A); GAO report at 15-16 (112JA). Moreover, the ban on abortion-related speech and the mandatory pro-childbirth speech apply in all instances. Since the statutory ban applies only to "abortion as a method of family planning", these strictures sweep too broadly. Speaking about abortion to a woman whose health would be endangered by pregnancy or who has been the victim of rape or incest, or who has experienced contraceptive failure, is in no sense encouraging the use of abortion as a "method of family planning".

In sum, no governmental interest can justify regulations designed to conceal abortion information from all women, exposing women to unnecessary health risks and forcing physicians and

[41] Neither can the regulations be justified by the federal government's interest in limiting its funding to "preventive" or "preconceptional" family planning. *See* § 59.2. First, there is nothing in the statute which supports such a narrow definition of family planning. In fact, Congress envisioned Title X as an entry point into the general health care system, *see* 116 Cong. Rec. 37370 (1970) (statement of Rep. Bush) (222A), and HHS still encourages Title X clinics to provide, where possible, medical services designed for general health maintenance, such as screening for breast cancer and sexually transmitted diseases. *See supra* note 3. Second, this purported concern is contradicted by the mandatory prenatal counseling provision of § 59.8(a)(2) and the mandated referral to prenatal care providers.

other health professionals to violate commonly accepted standards of medical practice and ethics. "[A]n attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate." *Carey v. Population Serv. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring).

2. *Section 59.10 Is A Viewpoint Discriminatory Restriction On Speech That Violates The First Amendment*

Under § 59.10(a) of the regulations, a project may not use Title X or its own funds to "encourage, promote, or advocate abortion as a method of family planning." (336A). Proscribed activities include lobbying, providing speakers, or using legal action to "encourage, promote or advocate abortion"; paying dues to any group that "as a significant part of its activities" advocates abortion as a method of family planning; or developing and disseminating any information that advocates abortion as a method of family planning. *Id.*

Like § 59.8, these proscriptions are directed solely at speech advocating a particular viewpoint; the regulation does not prohibit Title X projects from engaging in anti-abortion lobbying or speaking out against abortion in any way. In fact, the Secretary is quite candid in admitting that § 59.10 "does exhibit a bias in favor of childbirth and against abortion as a method of family planning." *See* Pr., 53 Fed. Reg. 2943 (338A). As noted above, such viewpoint-based discrimination is presumptively invalid under the First Amendment.[42]

Section 59.10 differs from the statute upheld in *Regan* in at least two ways. First, § 59.10 is viewpoint-based. Second, this regulation does not permit Title X grantees simply to establish affiliate corporate structures that could engage in the prohibited speech activities. Instead, § 59.9 requires absolute physical separation, and would likely bar any sharing of staff or even name, although because of the regulation's vagueness, it is hard to be sure. Section 59.10 is thus not the least restrictive alternative for

[42] The Second Circuit found that § 59.10 does not "in any way suggest that Title X funds may be used for public anti-abortion advocacy." *New York v. Sullivan*, 889 F.2d at 412-13, a position which the Secretary argued below. By contrast, the First Circuit found the Secretary's argument "factually untenable." *Mass. v. Sec'y*, 899 F.2d at 75.

ensuring that government funds are not spent on advocacy activities, as was the statute in *Regan*, because the government could accomplish this purpose simply by requiring separate cost-accounting.

3. *Section 59.9 Violates The First Amendment By Burdening Non-Title X Funded Speech*

Section 59.9 mandates that Title X projects "physically and financially separate . . . from activities which are prohibited under § 1008 of the Act and § 59.8 and § 59.10 of these regulations . . . Mere bookkeeping separation of Title X funds from other monies is not sufficient." Thus, unless they are prepared to lose Title X funds, grantees who want to provide abortion counseling and referral with non-Title X resources have no alternative but to undergo the substantial reorganization and duplication of expenditures dictated by the new separation requirement.

That this requirement would impose formidable financial and organizational burdens on Title X clinics in New York State is uncontroverted on the record.[43] Title X grants typically comprise far less than the 90% of the grantees' budgets, the limit allowed by statute. 42 U.S.C. § 300a-4(a)[44] As the district court found, it is not uncommon for Title X projects to share personnel and physical facilities with abortion clinics. *New York v. Bowen*, 690 F. Supp. at 1271. The First Circuit correctly understood that the costs of hiring extra staff and building separate rooms, entrances or buildings, all of which the Secretary has indicated will be taken into account, will impermissibly

[43] *See, e.g.*, Pasternack ¶ 14(g) (674-75A); Bennett ¶¶ 23, 30 (501A, 505A); Fink ¶ 13(a) (166JA); Gesche ¶ 18 (175-76JA); Drisgula ¶ 27 (156JA); Tiezzi ¶ 8(e) (275JA). The district court, although it upheld § 59.9, quoted extensively from the providers' affidavits on this point, conceding that it "goes much further than prior HHS policy and imposes significant changes on Title X projects." *New York v. Bowen*, 690 F. Supp. at 1271.

[44] None of the plaintiff organizations in this case funds its entire family-planning budget through Title X. For example, the district court found that the Bronx Center, a facility of plaintiff Planned Parenthood of New York City, receives a $439,391 Title X grant, amounting to 50% of its family planning budget. *New York v. Bowen*, 690 F. Supp. at 1263.

burden the grantees' non-Title X funded speech activities. *Mass. v. Sec'y*, 899 F.2d at 74.[45]

Moreover, the record below substantiates the claims by Title X providers that § 59.9 will generate conflicts between its requirements and those imposed by other public funders. All Title X grantees in New York, for example, also receive family planning grants from the State.[46] Under New York law, the NYSDOH is obligated to carry out the State's policy that "medical service" of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health." N.Y.S. Pub. Health Law § 2800 (McKinney 1985). Full informed consent is an essential element of high quality medical care under state law, as reflected in state codes of professional conduct, N.Y.S. Educ. Law §§ 6506-6509 (McKinney 1985), N.Y. Comp. Codes R. & Regs. tit. 8 (NYCRR) § 29.2 (1989), NYSDOH regulations covering family planning clinics, 10 NYCRR § 753.1, and standards relating to medical malpractice. N.Y.S. Pub. Health Law § 2805-d(1) (McKinney 1985); *see, e.g., Becker v. Schwartz*, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 336 N.E.2d 807 (1978).

New York's policy favoring full informed consent serves urgent public health needs in the State. For instance, the NYSDOH has notified state-subsidized family planning providers that in view of the AIDS crisis, they must offer HIV testing to all clients, Gesche ¶ 17 (175JA), with appropriate options counseling for those found infected. *Id.* Because such counseling would be speech prohibited under § 59.8, § 59.9 requires the separation of state supported programs from Title X programs, resulting in a drain on the grantees' resources and increased administrative burdens.[47]

[45] The Second Circuit, by contrast, brushed aside these concerns, noting only that §59.9 does not permit the Secretary to deny funding to grantees because they engage in abortion-related activities outside their employment in the Title X program. *New York v. Sullivan*, 889 F.2d at 413.

[46] In fact, state funding has superceded Title X as the major source of family planning assistance. Gesche ¶¶ 10-11 (172-73JA). The $5,817,471 awarded to NYSDOH for 1989-90 represents 24.8 percent of the total program funding of $23,489,837. Randolph ¶ 6 (243JA).

[47] Similarly, many Title X grantees also receive funds under the Maternal and Child Health Services Block Grant, Title V of the Social Security Act, 42 U.S.C.

(Footnote continued)

The Secretary's response to these concerns is clearly inadequate. "[C]urrent program policy allows grant funds to be used for the one-time costs associated with relocating a Title X clinic for the express purpose of complying with the . . . rules." Pr., 53 Fed. Reg. 2941 (336A). Yet common sense dictates that the costs occasioned by the separation requirement will be ongoing because of items such as additional salaries, insurance payments, utility bills, and rental or mortgage payments.

Although the government may require some amount of separation as a condition of funding, this Court has carefully described the limits within which such burdens can occur. In *Regan*, for example, the Court upheld a requirement of separation solely because "[t]he IRS apparently requires only that the two groups [the nonprofit organization and its lobbying affiliate] be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." 461 U.S. at 544 n.6. Moreover, while TWR would have to establish a separate corporation for lobbying, it would be able wholly to control its affiliate and thus be able to speak freely through it. *Id.* at 553 (Blackmun, J., concurring).

Here, § 59.9 lacks both saving qualities of the IRS rule. First, § 59.9 requires physical as well as financial separation, and allows the Secretary to take into account various factors in determining grantees' compliance, such as the existence of separate facilities and personnel.[48] The burdens occasioned by this requirement are much

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§701 (1982). Women seeking services under this program receive complete options counseling if fetal abnormalities are detected by amniocentesis or other genetic testing. Thus, §59.9 requires the separation of Title V programs from Title X programs. Gesche ¶¶ 12, 22 (173, 177JA); Bennett ¶ 23 (501-02A); Fink ¶ 13(c) (166-67JA).

[48] The Secretary may not evade the burdensome nature of § 59.9 by claiming, as he did below, that the implementation of the requirement would be on a case-by-case approach in which no one factor would be necessarily determinative. Grantees should not be forced to guess how much compliance is enough. Uncertainty about how the separation requirement will be implemented is itself a burden on the operation of Title X clinics. Bennett ¶ 23 (501-02A); Rust ¶ 19 (257JA).

Thus, the separation requirement, as well as the counseling, referral and advocacy ban are unconstitutionally vague. Courts must apply a strict vagueness

(*Footnote continued*)

greater than those which have been stricken by this Court. For example, in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), this Court struck down a ban on corporate election expenditures as applied to a non-profit, "pro-life" organization on the ground that a requirement "to speak through a segregated fund" may necessitate such "significant efforts" as to inhibit free speech. *Id.* at 252 (plurality opinion). *Cf. Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1406 n.7 (1990) (Brennan, J., concurring) (restriction on corporate campaign expenditure permissible because requirement that funds be segregated left open "avenues of communication" and did not "burden[] significantly" corporation's ability to speak); *id.* at 1423 (Kennedy, J., dissenting) (ability of corporation to speak through political action committee is "far from a saving feature" because avenue left open is "more burdensome").

Section 59.9 also fails the second part of the *Regan* test: Title X grantees will not be able to speak freely about abortion through their affiliated facilities. Until now, many Title X grantees have been able to refer women who wanted abortions to their co-sited abortion facilities. Because § 59.8 forbids referrals for abortion, and mandates exclusion from the referral list of all providers "whose principal business is the provision of abortions", health care professionals in Title X facilities will not be able to refer patients to their sister organizations for abortion counseling or procedures. Thus, the First Amendment rights of health care professionals in Title X programs to speak freely about abortion in non-Title X settings will be seriously impaired.[49]

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standard, where, as here, government regulation interferes with fundamental speech rights. *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 498-99 (1982); *NAACP v. Button*, 371 U.S. 415, 432 (1963). A Title X project cannot know what is required or prohibited by the physical separation requirement or, for that matter, by the prohibitions against "encouraging", "counseling" or "promoting" "abortion as a method of family planning" in §§ 59.8 and 59.10.

[49] The Secretary has made no showing that physical separation is even necessary to prevent federal funding of speech about abortion. *See generally Massachusetts v. Bowen*, 679 F. Supp. 137, 142 (D. Mass. 1988) (summarizing evidence showing no need for physical separation); *see also New York v. Sullivan*, 889 F.2d at 418 (Kearse, J., dissenting).

It is clear that the government may not condition benefits or subsidies on the relinquishment of constitutional rights exercised independent of government support.[50] "[E]ven though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). *See also Speiser v. Randall*, 357 U.S. 513, 518-19 (1958); *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 139-41 (1987).[51]

The government may not mete out favors in a way that prohibits or unduly burdens the exercise of constitutional rights on non-federal time or with non-federal funds; this includes the constitutional right to speak about abortion. The regulations thus violate the First Amendment by confronting family planning organizations with two alternatives, each of which punishes protected, non-Title X funded expression.

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[50] The new regulations penalize independently-funded speech activities in yet another way. Section 59.2 defines "Title X project funds" as "all funds allocated to the Title X program, including, but not limited to grant funds, grant-related income or matching funds." Title X projects have always been required to supplement federal grants with 10% matching funds. Most Title X programs also charge fees on a sliding scale for those clients who have the means to pay, a portion that would be designated "grant-related income". Therefore, in restricting the use of "Title X project funds," the regulations significantly limit the projects' use of nonfederal money. *See* Pr., 53 Fed. Reg. 2922 (317A).

[51] Statutes prohibiting the distribution of state funds to programs that provide abortion counseling, even with private funds, consistently have been held to condition benefits impermissibly on the relinquishment of constitutional rights. *See Planned Parenthood of Cent. & No. Arizona v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir. 1986), *aff'd sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986); *Planned Parenthood Ass'n v. Kempiners*, 531 F. Supp. 320 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983), *on remand*, 568 F. Supp. 1490 (N.D. Ill. 1983); *Valley Family Planning v. North Dakota*, 489 F. Supp. 238 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99 (8th Cir. 1981).

B. Section 59.8 Violates The Woman's Constitutional Privacy Right To Decide Whether To Continue Her Pregnancy

This Court has recognized that "the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." *Akron*, 462 U.S. at 419 (citing *Roe v. Wade*, 410 U.S. 113 (1973)). Therefore, "a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the State.'" *Id.* at 429-30 (*quoting Roe*, 410 U.S. at 163). Because the right is at its core a decisional right [52], the woman cannot effectively exercise it unless the physician has fully informed her of all of her options. Thus, governmental efforts to invade the physician-patient relationship and to pollute the decisional process with extraneous ideological considerations have been consistently turned aside by this Court. *Akron*, 462 U.S. at 445. *See also Thornburgh*, 476 U.S. at 762.

The court of appeals, citing *Maher*, 432 U.S. 464, *McRae*, 448 U.S. 297, and *Webster*, 109 S. Ct. 3040, erroneously upheld the regulations as a permissible condition on funding that did not as a matter of law burden the privacy right. 889 F.2d at 410-12. But here, unlike in *McRae* and *Maher*, the unrebutted evidence demonstrates that it is the regulations, and not the patients' indigency, that will harm Title X program clients.[53] Regardless

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[52] *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (the right of personal privacy includes an "interest in independence in making certain kinds of important decisions").

[53] The Second Circuit majority conceded that the regulations "may hamper or impede women in exercising their right of privacy in seeking abortions," 889 F.2d at 411, but held that this fact was "constitutionally irrelevant". *Id.* The majority erred in so holding, however, since this Court has always examined conditions on funding for their actual effect on protected rights. *See, e.g., Lyng v. Int'l Union, United Auto. Workers*, 485 U.S. 360 (1988) (upholding constitutionality of federal statute disqualifying households of striking workers from eligibility for food stamps, finding it "exceedingly unlikely" that it would actually affect associational rights). Unlike the Second Circuit, the First Circuit examined the actual effects of the regulations on the privacy right. *Mass. v. Sec'y*, 899 F.2d at 69-70.

of the resources or other sources of information available to these women,[54] they have come to rely upon Title X health clinics dispensing low-cost, high quality health care, and may not seek counseling and referral elsewhere. Instead of receiving those services they have come to rely upon, they will be given misleading referrals, *e.g.*, Sammons ¶ 13 (266-67JA); Fink ¶ 12(f), (g) (165JA); Joseph ¶ 9 (203-04JA); they will be confronted with health professionals required to be unresponsive to the fact of unwanted pregnancy, Rust ¶ 20 (257-58JA); Sammons ¶ 4 (262JA); and they will be delayed if not deterred from obtaining an abortion, Henshaw ¶¶ 12, 15, 21 (192, 193, 195-96JA); Bennett ¶¶ 19, 20 (500A); Klepper ¶ 20; Rust ¶¶ 10, 13 (252-53JA); Morley ¶ 12-14 (227-28JA); Drisgula ¶ 22 (154-55JA); Potteiger ¶ 17 (91a). In addition, the mandatory speech promoting childbirth can cause emotional distress to the woman and irreparably damage the physician-patient relationship.[55] These burdens will render many women who seek care at a Title X clinic worse off than had they never consulted a Title X provider. *E.g.*, Katz ¶ 18 (211-12JA).

For these reasons, the regulations directly contravene the right announced in *Roe* and reaffirmed in *Akron* and *Thornburgh*:

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[54] Most Title X patients do not have the resources to "shop around" for alternative counseling, but a minority does. While priority is given to low-income women (100% of the federal poverty line), 42 C.F.R. §§ 59.2; 59.5(a)(6)(7), the regulations also require grantees to provide services to women with incomes up to 250% of the federal poverty line on a sliding scale based on ability to pay. 42 C.F.R. § 59.5(a)(8) (12-13A). Above this level Title X grantees provide services for "reasonable cost." *Id.* Thus, some patients who can pay will be affected by the new regulations where their ability "to go elsewhere [may be] significantly diminished because [they have] already paid what [they] could afford to the Title X clinic", as the First Circuit noted. 899 F.2d at 70. The Second Circuit erred in assuming that this point had not been raised by plaintiffs. 889 F.2d at 413-14.

[55] Instructions to the pregnant woman about how to promote the welfare of her "unborn child" would be inappropriate in cases where the woman is pregnant by rape or incest, or where she has already indicated a strong desire *not* to continue the pregnancy. In those circumstances, such speech from a physician might seem to the woman irrelevant at best, and insensitive or arrogant at worst, thereby irreparably damaging the counseling relationship. *See* Katz ¶¶ 6-7 (207JA).

the right to be free from unwarranted state interference in the process of deciding whether or not to bear a child. The regulations place "unreasonabl[e] . . . 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'" *Akron*, 462 U.S. at 445 (*quoting Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)). Such obstacles violate the right to privacy because "full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.'" *Akron*, 462 U.S. at 427 (*quoting Doe v. Bolton*, 410 U.S. 179, 192 (1973)).

CONCLUSION

For the above reasons, the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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